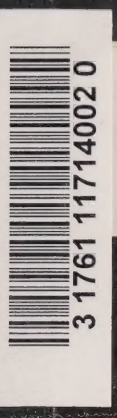

Rail lines: current conveyance and abandonment procedures and replacement proposals in Bill C-101

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RAIL LINES: CURRENT CONVEYANCE AND ABANDONMENT PROCEDURES AND REPLACEMENT PROPOSALS IN BILL C-101

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INTRODUCTION

On 20 June 1995, Bill C-101, the Canada Transportation Act, was introduced in the House of Commons by the Minister of Transport, the Hon. Douglas Young. If enacted into law, the bill would replace the *National Transportation Act, 1987*, the *Passenger Ticket Act,* the *Government Railways Act* and certain elements of the *Railway Act*, and would rename the National Transportation Agency as the Canadian Transportation Agency. According to departmental information, rationalization of the rail network to date, by either sale or lease to another rail operator or by abandonment, has proven to be adversarial, costly and time-consuming. Among other things, the bill would restrict government involvement in the day-to-day affairs of the rail industry and would streamline and shorten the current process for rail line rationalization, making it commercially oriented, less adversarial and more conducive to the sale or lease of surplus rail lines to new operators.

In a speech to the Western Transportation Advisory Council in November 1994, the Transport Minister stated:

> We must reduce the government regulatory burden. Rail (is) the only transportation mode in Canada whose business decisions can be regularly delayed, varied and sometimes even reversed by public authorities. Over the past 10 years, the airline and trucking industries have been significantly de-regulated, and the time has come now to do the very same thing for the rail industry.

If enacted into law, Bill C-101 would, among other things, diminish the costly burden of excess regulation in the rail industry by reducing railway actions or decisions requiring government approval from the current 200 to some 40.

Insofar as rationalization of the rail network is concerned, the bill would shift the focus from the current abandonment of underused rail lines to the development of a healthy short line industry (i.e., local rail carriers). The proposed streamlined rail rationalization process is thus designed to encourage the sale or lease of rail lines to short line operators. According to departmental sources, approximately two-thirds of the rail lines in Canada that are likely candidates for rationalization could support viable short line operations.

This paper outlines the current conveyance and abandonment procedures under the *National Transportation Act, 1987* and the procedures that would replace them if Bill C-101, the Canada Transportation Act, were enacted into law.

CURRENT CONVEYANCE AND ABANDONMENT PROCEDURES[1]

A. Conveyance Procedure

The *National Transportation Act, 1987* currently permits a railway company within federal jurisdiction (e.g., CN or CP) to enter into an agreement with any other company to sell, lease or otherwise convey a line of railway without this being considered an abandonment of the operation of the line. The agreement is, however, subject to the approval of the National Transportation Agency. When a railway company enters into such an agreement, it must give written notice to the Agency that it has done so and give such public notice as the Agency may direct.

In accordance with the *National Transportation Agency General Rules*, the public notice invites interested parties to present their views to the Agency on the proposed conveyance no later than 30 days from the date of the notice and allows the applicant 10 days to respond to the matters raised by the public. Upon request or by its own motion, the Agency may shorten or lengthen this time frame as it deems appropriate.

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(1) The information in the following overviews of the conveyance and abandonment procedures is drawn from documents prepared by the National Transportation Agency.

The Act requires that within six months of receipt of the notice of the conveyance agreement, the Agency must, after holding any public hearings it decides are necessary, approve the conveyance agreement unless it has determined that this would not be in the public interest or that the company to whom the line is to be conveyed is not authorized to operate it.

Aspects of public interest raised by the public and considered by the Agency in respect of conveyance applications include the financial stability and operational viability of the acquiring carrier and the extent to which the latter will be able to continue to provide the same or an improved level of service to existing and potential shippers.

Once the Agency approval is granted, if the line is conveyed from one railway company to another, the conveying company has no further obligations under the *National Transportation Act, 1987* with respect to the operation of the line. If the acquiring company falls under federal legislative authority, it is deemed to assume all such obligations or obligations under any other federal legislation governing the operation of the line.

If, at the time of conveyance, there is any agreement between the conveying railroad and VIA Rail with respect to the operation of a rail passenger service on that line or a segment of it, the rights and obligations held by the conveying railroad pass to the acquiring company, as amended by an agreement between it and VIA Rail. The line or segment is then declared to be a work for the general advantage of Canada until it is abandoned or the passenger service on the conveyed portion of the line is discontinued.

Where the acquiring railway company does not fall under federal legislative authority and there has been no agreement between the conveying company and VIA Rail with respect to passenger service, the line ceases to be a work for the general advantage of Canada.

B. Abandonment Procedure

Prior to 1 January 1993, a railway company under federal jurisdiction was not permitted to abandon more than 4% of its total trackage in any calendar year. The current rail line abandonment procedure under the *National Transportation Act, 1987* and the accompanying *Railway Lines Abandonment Regulations* come into play when a railway

company under federal legislative authority wishes to abandon the operation of the whole or a portion of a railway line. To do so, it must obtain the authorization of the National Transportation Agency, first giving at least 90 days' notice to both the Agency and those parties prescribed by regulation. The *Railway Lines Abandonment Regulations* require the railway company to publish the notice in the newspaper with the largest circulation in each area served by the line and to distribute it to affected or interested parties.

Ninety days after the notice of intent is received by the Agency, the railway company can apply for permission to abandon the operation of the line. Where it considers it to be in the public interest, the Agency may abridge the 90 days or grant leave to the railway company to make the application without giving such notice.

When filing the abandonment application, the railway company must also publish a notice of application in the newspaper with the largest circulation in each area served by the line. Copies of the notice, together with a statement of the costs, revenues and traffic attributable to the operation of the line must be served on affected or interested parties.

An application for the abandonment of the operation of a rail line is also subject to the provisions of the *Canadian Environmental Assessment Act* and *the Inclusion List Regulation* under that Act. Before deciding the extent of any adverse environmental impacts of the proposed abandonment and whether it should be allowed to proceed, the Agency will thus have to ensure that an environmental assessment of the proposed abandonment has been completed and an environmental screening report prepared.

A written statement justifying any opposition to the abandonment must be filed with the Agency within 60 days from the notice of application or from the last date of newspaper publication of the notice. If there are no opposing interventions within the 60-day period, the Agency must forthwith order the abandonment of the line to take place no earlier than 30 days, but no later than one year, from the date of the order.

Where, however, opposing interventions have been received, the Agency must review the traffic, revenue and cost statements filed with the application, determine the actual losses incurred by the railway company in operating the line, and make the results public. The Agency must also determine if the operation of the line is economic and, if it is not,

whether there is any reasonable probability of its becoming so in the foreseeable future. In making this determination, the Agency may hold public hearings, if it so chooses.

If the determination is that the operation of the line is uneconomic and that there is no reasonable probability of its becoming economic in the foreseeable future, the Agency must, within six months after receiving the application, order abandonment. This must take place no earlier than 30 days or later than one year from the date the Agency issues the order. If passenger service is operated by VIA Rail on the line in question, the abandonment must take place one year from the date of the order. During the intervening period, VIA Rail must decide whether it will acquire the line, make other arrangements to continue its passenger service, or discontinue the service; it must inform the Agency of its decision within the first six months after the date of the order.

Abandonment will not be ordered if the Agency determines that the operation of the line is at present economic or, if not, that there is a reasonable probability that it will become so in the foreseeable future, and, in either case, that continued operation is in the public interest. Otherwise, it must, within six months after receiving the application, order abandonment to take place no earlier than 30 days or later than one year from the date of the order.

Where a line is ordered continued as being in the public interest and that line is not yet economic (see preceding paragraph), the railway company may apply for a subsidy to cover the losses incurred; the subsidy applies only to branch lines and not to any main lines ordered continued. Where the operation of the line is ordered continued, the Agency must reconsider the application at least once every three years after it has received the application. Where the Agency has dismissed an abandonment application, the rail carrier may re-apply for abandonment at its convenience.

Under the *National Transportation Act, 1987*, an appeal lies from the National Transportation Agency to the Federal Court of Appeal on a question of law or jurisdiction. Also, the Governor in Council may, at any time, vary or rescind any decision, order, rule or regulation of the Agency, and any order that the Governor in Council may make with respect thereto is binding on the Agency and on all parties.

PROPOSED PROCEDURE

As noted earlier, Bill C-101, the Canada Transportation Act, would, if enacted into law, among other things, greatly streamline and shorten the rail line rationalization process in order to encourage the sale or lease of rail lines to local rail carriers ("short line operators"). Departmental sources emphasize that the bill would shift the focus from the current abandonment of underused rail lines toward the development of a healthy short line industry, offering great potential for revitalizing the rail sector and retaining service to smaller communities where rail lines might otherwise be abandoned.

As noted above, federally regulated railways currently require approval from the National Transportation Agency in order to abandon a rail line. The procedure is costly and time-consuming and is likely to require proof that a line is uneconomic. Departmental sources point out that railways wishing to abandon particular lines are consequently encouraged to allow service to deteriorate on those lines. There is thus no incentive to market underused lines or to find potential purchasers. The present process also invites appeals for government intervention to prevent abandonment.

The department points to experience in both Canada and the U.S. showing that short lines and main line carriers typically operate in close partnership, with one feeding traffic to the other. Short lines, it notes, enhance shipper service and encourage the development of more cost-efficient and service-oriented industry practices.

According to departmental sources, deregulation in the U.S. fostered the formation of over 250 smaller feeder railroads; by contrast, there are currently only 12 short line railways in existence in Canada, in addition to regional railways and U.S. freight railways operating into this country. In the U.S., although 34% of the main lines' networks were surplus to their needs, less than half of this surplus track was abandoned. Fifteen years after deregulation in the U.S., there are now approximately 500 smaller feeder railroads operating in total over one-quarter of the freight track in all 50 states, employing 12% of all American rail workers, and generating 10% of total U.S. rail freight income.

For the above reasons, Bill C-101 would, if enacted into law, greatly help to streamline the rail rationalization process, encouraging the sale or lease of lines to short line operators. It would do so as set out in the relevant portion of the bill, namely, Division V (respecting transferring and discontinuing the operation of rail lines - clauses 140-146) of Part III (respecting railway transportation).

Unlike the current situation, the conveyance procedure set out in the bill would not require governmental confirmation through a regulatory process. The current owner or operator would have to follow a notification and offer procedure, with the objective of finding an alternative owner or operator in the private sector to continue operation of the line. The process would thus be commercially oriented and managed by the current line owner or operator without direct reliance on regulation or governmental decision. If continued operation as a going concern did not result, the different levels of government would be given an option, in rotation, to obtain the line for any purpose on payment of its net salvage value. Unlike the present situation, the operation of the line could be discontinued (the bill does not use the terms "abandoned" or "abandonment") only where there was no private or public sector buyer.

A railway company under federal legislative authority would be required to prepare and keep current a plan indicating, for each of its rail lines, whether it intended to continue to operate it, or, within the next three years, to lease, sell or otherwise transfer it (or its operating interest in it), or to take steps to discontinue operating it. The plan would have to be available for public inspection in a designated office of the railway company. A sale, lease or other transfer of a rail line would be void unless, before the transfer was completed, the plan indicated the railway company's intention to transfer or discontinue.

The purpose of the three-year plan, which would be similar to a three-year plan in the United States, would be to ensure that there was regular public notification by a federally regulated railway company for any change in the ownership or operations of a line.

Before discontinuing the operation of a rail line, a railway company would be required to comply with the relevant steps set out in the bill. The only exception would be with respect to the operation of a grain dependent branch line listed in Schedule I that the

Governor in Council had designated on written notice to the railway company. In this case a railway company would have to discontinue operation of the line not later than 30 April 1996. After that date, any remaining lines in Schedule I would be subject to the same rules for discontinuance as other lines.

There would be an obligation on the railway company to advertise the availability of the rail line, or the company's operating interest in it, for sale, lease or other transfer for continued operation and its intention otherwise to discontinue operating the line. The advertisement would have to include a description of the rail line and an outline of the steps required before operation could be discontinued, including a) a statement that the advertisement was directed to persons interested in buying, leasing or otherwise acquiring the line or the railway company's operating interest in it, for the purpose of continuing rail operations and b) the date by which such persons would have to make their interest known to the company in writing. That date would have to be at least 60 days after the first publication of the advertisement. In addition, the advertisement would have to disclose the existence of any agreement between the railway company and VIA Rail in respect of the operation of a rail passenger service on the line, provided VIA Rail had advised the railway company that it agreed to the transfer of the company's rights and obligations under the agreement to any person acquiring the line, or the company's operating interest in it. If VIA Rail had not so advised the railway company, or had told it that it did not agree to the transfer of rights and obligations, the agreement between VIA Rail and the railway company would terminate on the effective date of any transfer of the line, or the company's operating interest in it, under Division V.

The railway company would be required to disclose to all persons expressing their interest the process it would follow for receiving and evaluating offers. Such disclosure would encourage an orderly, professional approach to the conveyance process, while permitting the line owner or operator to be completely flexible. If the advertisement disclosed the existence of an agreement between the railway company and VIA Rail, the railway company, in evaluating each offer, would be obligated to consider whether the interested party was willing to assume the company's obligations under that agreement.

The railway company would have to negotiate with an interested person in good faith and in accordance with the process it had earlier set out. Prior disclosure of the process would provide a benchmark for determining whether the owner or operator had proceeded in good faith. After the final date for offers, the railway company would have five months to reach an agreement with an interested person.

It might be that no person in the private sector made an interest known or that no agreement with an interested person was reached within the required time, or that an agreement was reached within the required time, but the transfer was not completed in accordance with the agreement. In such cases, a railway company would be obliged to offer to sell, lease or otherwise transfer the rail line, or its operating interest in it, to the following governments for its net salvage value to be used for any purpose. The railway company would be required to offer the line to the Minister of Transport, if the line passed through more than one province or outside Canada; to the Minister responsible for transportation matters in each of the provinces through which the line passed; and to the clerk or other senior administrative officer of each municipality through which the line passed. Each level of government would have an exclusive period of 15 days to accept the offer, if this had not been accepted by the immediately higher level of government. Thus, after the offer had been received

a) by the Minister of Transport, the Government of Canada would have 15 days within which it could accept it;

b) by a provincial Minister, the provincial government would have 15 days within which it could accept it. If the offer was also received by the federal Minister of Transport but not accepted by the Government of Canada within the exclusive 15-day period, the government of each province through which the line passed would have an additional 15 days during which it could accept it;

c) by the government of a municipality, the municipality could have an additional 15 days within which to accept the offer, if this had not been accepted by the Government of Canada or a province.

Once a government communicated its written acceptance of the offer to the railway company, the right of any other government to accept the offer would be extinguished and the railway company would be obliged to so notify the other governments.

The bill does not include a definition of net salvage value. Should a government accept the railway company's offer of the rail line for its net salvage value, but not be able to agree with the railway company on that value within 90 days, the Canadian Transportation Agency could determine the net salvage value.

Finally, only if the rail line or the railway company's operating interest in it was not transferred after completion of the full process set out in the bill, could the railway company discontinue operating the line. In other words, if the above procedure was followed and no party, including any level of government, was interested in acquiring the line, the railway company would be free to cease operation and dispose of the assets as it wished.

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